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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 282.

BONWIT TELLER & CO.,
Petitioner,

against

THE UNITED STATES,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

BRIEF FOR BONWIT TELLER & CO., PETITIONER.

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PRESS OF FREMONT PAINE, NEW YORK CITY

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BRIEF FOR BONWIT TELLER & CO., PETITIONER.

This case is before the Court on a writ of certiorari granted October 13, 1930 (51 Sup. Ct. 34), and involves a suit brought by the respondent in the United States Court of Claims for the recovery of a sum of money certified by the Commissioner of Internal Revenue as an overpayment of taxes for the year 1919, and allowed by him as a refund to the petitioner.

Opinions Below.

The United States Court of Claims, 39 F. (2d) 730; (R. 18-30).

The judgment of the Court of Claims based upon the special findings of fact made by the Court dismissed the petition. Judge Green wrote the prevailing opinion supporting the judgment, which was concurred in by Judge Williams and Chief Justice Booth. Judge Littleton wrote in dissent, and his opinion was concurred in by Judge Graham.

Jurisdiction.

This Court has jurisdiction under Section 3 (b) of the Act of February 13, 1925 (c. 229, 43 Stat. 939, U. S. c. Title 28, Section 288 [b]).

The petitioner prayed for a writ of certiorari on the ground that the Court of Claims had departed from well settled principles enunciated by this court, as well as its own, in holding that the determination of the Commissioner of Internal Revenue that an overpayment of taxes had been made, and granting a refund thereof, were not binding upon the United States in the absence of fraud or mutual mistake, and that it had the power to review his action and to determine the sufficiency of the claim for refund filed with him. It also prayed for the writ upon the ground that the Court of Claims erred in reversing the Commissioner's action.

Questions Presented.

1. Is the determination of the Commissioner of Internal Revenue, fixing the tax liability of a taxpayer and allowing a refund of overpayment, binding upon the United States, where neither fraud nor mistake is asserted?

2. If an action upon his certificate of allowance, has the Court of Claims the power to review his determination and to pass upon the sufficiency of the claim for refund?

3. Was the refund in the instant case properly allowed by the Commissioner of Internal Revenue?

The Statutes Involved.

R. S. Sec. 3220, Ch. 27, 44 Stat. 115, as amended and in force at the date the claim for refund was allowed, provides:

> "Except as otherwise provided in sections 284 and 319 of the Revenue Act of 1926, the Commissioner of Internal Revenue, subject to regulations, prescribed by the Secretary of the Treasury, is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected, * * *."

Section 284 of the Revenue Act of 1926 (Chap. 27, 44 Stat. 66) provides:

> "(a) Where there has been an overpayment of any income, war-profits, or excess-profits tax imposed by this Act, the Act entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes,' approved August 5, 1909, the Act entitled 'An Act to reduce tariff duties and to provide revenue for the Government and for other purposes,' approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, the Revenue Act of 1921, or the Revenue Act of 1924 or any such Act as amended, the amount of such overpayment shall, except as provided in subdivision (d), be credited against any income, war profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.

(b) Except as provided in subdivisions (c), (d), (e), and (g) of this section—

(1) No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this Act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim therefor is filed by the taxpayer; and

(2) The amount of the credit or refund shall not exceed the portion of the tax paid during the three or four years, respectively, immediately preceding the filing of the claim, or if no claim was filed, then during the three or four years, respectively, immediately preceding the allowance of the credit or refund.

* * * * * * * * *

(g) If the taxpayer has, within five years from the time the return for the taxable year 1917 was due, filed a waiver of his right to have the taxes due for such taxable year determined and assessed within five years after the return was filed, or if he has, on or before June 15, 1924, filed such a waiver in respect of the taxes due for the taxable year 1918, then such credit or refund relating to the taxes for the year in respect of which the waiver was filed shall be allowed or made if claim therefor is filed either on or before April 1, 1925, or within four years from the time the tax was paid. *If the taxpayer has, on or before June 15, 1925, filed such a waiver in respect of the taxes due for the taxable year 1919, then such credit or refund relating to the taxes for the taxable year 1919 shall be allowed or made if claim therefor is filed either on or before April 1, 1926, or within four years from the time the tax was paid.* * * *" (Italics ours.)

Section 281 (e) of the Revenue Act of 1924 (the act prior to the Revenue Act of 1926) as amended by the Act of March 3, 1925, Ch. 435, 43 Stat. 1115, provided:

"If the taxpayer has, on or before June 15, 1925, filed such a waiver in respect of the taxes due for the

taxable year 1919, then such credit or refund relating to the taxes for the taxable year 1919 shall be allowed or made if claim therefor is filed either on or before April 1, 1926, or within four years from the time the tax was paid. * * *"

It will be noted that the amendment of 1925 forms part of section (g) of the 1926 Act.

Statement of the Case.

This action was brought to recover the sum of $10,866.43 and interest representing an overpayment of income and profits tax made by the petitioner for the fiscal year ended January 31, 1919, the overpayment having been certified by the Commissioner of Internal Revenue of the United States, and the refund thereof duly allowed by him for the full amount in suit. The action was necessitated by the fact that the Commissioner of Internal Revenue applied against the overpayment, a tax alleged to be due from the petitioner for the fiscal year ended 1917, the collection of which was, at the time of such application, concededly barred by the Statute of Limitations in such cases made and provided.

The petition in the Court of Claims contains two causes of action (R. 5-7). The first recites the filing by petitioner of a tax return for the fiscal year ended January 31, 1919 and the payment of tax in the sum of $57,871.17, the certification by the Commissioner of Internal Revenue to the petitioner that it had overpaid the tax in the sum of $10,866.43, the issuance by the Commissioner of Internal Revenue to the petitioner of the certificate of over-assessment for the said sum upon a claim for refund thereof, the tender of payment of the amount, less the tax alleged by the Commissioner to be due from the petitioner for the year 1917 amounting, with interest, to the sum of $9,846.06, and the rejection of the tender and the demand for pay-

ment of the full amount represented by the Certificate of over-assessment and over-payment, to wit, $10,866.43.

The second cause of action recites that on or about the 12th day of May, 1927, the respondent duly stated an account with the petitioner showing its liability for taxes for the fiscal year ended January 31st, 1919, upon which statement there was found and agreed to be due to petitioner the sum of $10,866.43, said statement being annexed as Exhibit "A" (R. 8-9).

A general traverse to the petition was filed by the United States, and upon the issues framed by the petition and this general traverse, testimony was taken and completed before a Commissioner of the Court of Claims.

The only question ever at issue between the United States and the petitioner up to that time was whether or not the $10,866.43, which the latter had been allowed, could legally be reduced by crediting against it a tax, the collection of which was barred by the Statute of Limitations. Before the Commissioner, the United States definitely abandoned its position, admitted that the deduction had been erroneously made and attempted to attack the integrity of the certificate of over-assessment by asserting that the Commissioner of Internal Revenue should not have issued it. Petitioner insisted that such matter was not in issue under the general traverse; that the certificate of over-assessment could not be attacked in the action; that it was valid and binding until in proper manner it should be revoked and cancelled and that such cancellation and revocation must be sought, if at all, by direct action; that to succeed in such an action fraud or mutual mistake must be established. Appropriate objection was therefore made to all evidence offered to support the position taken by the respondent's counsel. However, all of it was received and considered and made the subject of special findings by the Court of Claims. (Appendix.)

After the taking of the testimony had been completed and the petitioner had filed its brief with the Court, the

respondent was permitted to file a counterclaim against the petitioner for the difference between the sum of $10,866.43 the amount of the overpayment for 1919 and the amount of $9,846.06 alleged to be due from the petitioner for the year 1917. This difference was the sum of $1,020.37, check for which had been tendered to the petitioner and rejected by it. This counterclaim was based upon the assertion that the Commissioner had no right to allow the refund or issue his certificate of overassessment. The counterclaim having been dismissed in the Court below, and there being no controversy here concerning it, no further reference will be made to it.

For the fiscal year involved in this suit, the Commissioner of Internal Revenue, faced with the running of the Statute of Limitations against the assessment and collection of the tax, made a jeopardy assessment in the sum of $167,249.59 (Special Finding 3, R. 13). This was duly protested and a claim for abatement filed. As a result of proceedings arising therefrom, the Commissioner of Internal Revenue determined that not only were there no additional taxes due, but that the petitioner had overpaid its tax in the sum of $10,866.43 (Special Finding 4, R. 13).

Under date of November 19, 1924, the Commissioner of Internal Revenue notified the petitioner of its determination but advised that inasmuch as the provisions of Sec. 281 (governing refunds) of the Act of 1924 had not been complied with, he could not refund the overpayment (Special Finding 4, R. 14). Whether he was correct at that time in declining to make the refund under the circumstances, it is unnecessary to consider.

In March of 1925, Subdivision E of Section 281 of the Revenue Act of 1924 was amended. The subdivision originally extended the time for allowance of refunds in favor of those who filed waivers, but this extension was limited to taxes up to the fiscal year 1918. The amendment made

similar provision for allowance of refund of taxes for the year 1919 and thus cured the objection which the Commissioner had made and enabled him to make the refund of the overpayment above referred to.

After the amendment was passed, the Commissioner wrote to the taxpayer under date of May 16, 1925, as follows:

> "An examination of your income-tax return for the year ended January 31, 1919, discloses an apparent over-assessment of tax for the year. It appears that the over-assessment can not now be allowed, due to the limitation of time for allowanee thereof, provided by section 281 of the revenue act of 1924, *unless an income and profits tax waiver is filed on or before June 15th, 1925, as provided by an act of Congress dated March 3, 1925, amending section 281 E of the revenue act of 1924. Two waiver forms are therefore enclosed in order that you may, if you desire, execute and forward one of the forms to this office.*" (Italics ours.) (Special Finding 5, R. 14.)

On May 22nd, the waiver was forwarded by the petitioner to the Bureau of Internal Revenue and was received on the 23rd and accepted in writing by the Commissioner (Special Finding 5, 6, R. 15).

Subsequently the Commissioner requested the petitioner to execute and file a formal claim on form 843 furnished by him, setting forth the basis of the adjustment which was, of course, that already determined by him. This formal claim was immediately filed (Special Finding 7, R. 15-16). Upon receipt of this, the Commissioner allowed the claim for refund and duly issued his certificate No. 990988 showing overassessment and overpayment by the petitioner of the sum of $10,866.43 for the fiscal year ended Jan. 31, 1919 (Special Finding 9, R. 16). Thereafter, the Commissioner of Internal Revenue having credited against this overpayment the sum of $9,846.06 sent to the petitioner a check for $1,462.99 representing the balance of

the overpayment amounting to $1,020.37 and interest in the amount of $442.62. This check was rejected and the petitioner having failed to persuade the Commissioner that he could not legally deduct from the amount of the overpayment, an amount claimed by him to be due from the petitioner for taxes of 1917, collection of which had been barred by the Statute of Limitations, brought this suit.

We make reference in detail to the findings only for the purpose of giving to the court a clear understanding of how this controversy arose. This detailed statement discloses that the refund was not allowed in the first instance because the Commissioner claimed that it was barred by the Statute of Limitations and that it was allowed subsequently under the enabling amendment of 1925.

We contended below that in this action the certificate of overassessment and overpayment alone was material; that the only issue before the Court was whether the barred tax of 1917 could be properly set off against the overpayment; that the impropriety of this deduction having been conceded, there was no other issue before the Court; that the integrity of the certificate of the Commissioner could not be attacked in this action, and that if it were subject to attack at all, it must be attacked upon the ground that fraud had been practiced in its procurement, or that a mutual mistake of fact had led to its issuance.

The Court of Claims by a vote of three to two has held that the action of the Commissioner in allowing the claim for refund is not binding and conclusive in this action; that it has the power to review his action and to determine its propriety and it has reversed him and dismissed the petition. We contend that the Court below has erred in all these respects.

ARGUMENT.

Under Section 3220 of the Revised Statutes and under Section 284 of the Revenue Act of 1926 in effect at the time of the allowance of the refund in the instant case, the Commissioner of Internal Revenue is authorized to remit, refund and pay back all taxes erroneously or illegally assessed, and collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected. He is the only officer of the United States so empowered and his determinations, within the scope of the authority vested in him are final, conclusive and binding upon the United States, in the absence of fraud or mutual mistake.

In the instant case, the Commissioner of Internal Revenue has determined that the petitioner overpaid its taxes for the fiscal year ended January 31st, 1929 in the sum of $10,866.43 and has, pursuant to the authority exclusively vested in him, duly allowed and directed the refund thereof. The Collector having certified that the petitioner was indebted to the United States for additional taxes for the year 1917, offset it against the overpaid tax and tendered a check to the petitioner for the difference, which was rejected. Thereupon, petitioner brought this suit, and, as we have shown, the United States, having admitted that it could not legally offset the alleged tax of 1917, the collection of which was barred by the Statute of Limitations, attacked the determination of the Commissioner of Internal Revenue allowing the refund, and the integrity of the certificate which he had issued, upon which the suit was based.

The assertion that the Commissioner of Internal Revenue is vested with exclusive authority to determine on behalf of the United States the liability of those subject to

tax, the amount of such tax, and whether there has been an overpayment, and if so, whether refund thereof should be allowed, has not and cannot be controverted. A long line of decisions places the stamp of finality and conclusiveness upon his determination and action until impeached for fraud or mutual mistake.

U. S. v. *Kaufman*, 96 U. S. 567;
U. S. v. *Savings Bank*, 104 U. S. 728;
U. S. v. *Louisville*, 169 U. S. 249;
Penrose v. *Skinner*, 278 Fed. 284;
U. S. v. *Detroit Steel Products*, 20 Fed. (2d) 675, 677;
Woodworth v. *Kales*, 26 Fed. (2d) 178;
Atlanta Casket Co. v. *Rose*, 22 Fed. (2d) 800;
Woolner v. *U. S.*, 13 Ct. Cls. 355;
Bank of Greencastle's case, 15 Ct. Cls. 225;
Dugan v. *U. S.*, 34 Ct. Cls. 458;
Sybrandt v. *U. S.*, 19 Ct. Cls. 461.

In *United States* v. *Kaufman*, supra, the Court said:

"It is now insisted that the finding of an allowance by the Commissioner is not enough, and that the Court should have gone behind the allowance and found the facts in respect of the original claim. *Such we think is not the law.* To say the least, the allowance of a claim under this statute is equivalent to an account stated between private parties which is good until impeached for fraud or mistake. It is not the allowance of an ordinary claim against the government by an ordinary accounting officer but the adjudication by the first tribunal to which the matter must by law be submitted. Until so submitted and until so adjudicated, there is not even a prima facie liability of the government, but when submitted and when allowed upon the adjudication, the liability is complete until in some appropriate form it is impeached. When, therefor, the court found the adjudication against the government without impeachment, the liability to pay

was established. We do not decide that in the Court of Claims the adjudication of the Commissioner may not be impeached, but we do decide that until impeached it is binding and that the affirmative of the impeachment is upon the Government."

In *United States* v. *Savings Bank*, supra, the Commissioner of Internal Revenue had certified a claim to recover taxes and penalties, but upon the presentation of the certificate, the Treasury Department refused to make payment. Action was brought in the Court of Claims to recover. Mr. Chief Justice Waite who had also written the opinion in *United States* v. *Kaufman*, supra said:

"Whether his allowance is conclusive on the other officers through whose hands it must necessarily pass before it can be paid by the Treasurer, we did not then and need not now decide. All we said then and all we say now is that if payment is not made by reason of the refusal of any of the officers of the department to pass or pay the claim after it has once been allowed by the Commissioner the allowance may be used as a basis of an action against the United States in the Court of Claims where it will be prima facie evidence of the amount that is due and put on the Government the burden of showing fraud or mistake. This burden is not overcome by proving that some other officer in the subsequent progress of the claim through the department declined to do what the law or treasury regulations required of him before payment could be obtained. The fact of fraud or mistake must be established by competent evidence the same as any other fact in issue."

In *United States* v. *Detroit Steel Products Co.*, supra, which was an action to recover taxes paid on leaf springs, after the refund thereof by the Commissioner of Internal Revenue, the court said (p. 677):

"Section 3220 of the United States Revised Statutes, as amended, which is now Section 149, of Title

26 of the new United States Code (Comp. St., Sec. 5944), provides that the Commissioner of Internal Revenue 'is authorized to remit, refund and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected.' It is settled law that where, as here, Congress has conferred upon the Commissioner of Internal Revenue authority, in such broad language as is contained in the statute already quoted, to determine whether taxes have been erroneously collected, and should therefore be remitted or refunded to a taxpayer, it must be held that it was the congressional intention to intrust the determination of the questions therein involved to the discretion of the Commissioner acting in a quasi judicial, rather than a ministerial capacity, and that his exercise of such discretion, unless impeached for fraud or mistake, must be accepted as final and conclusive, and not subject to review. United States v. Kaufman, 96 U. S. 567; 24 L. Ed. 792; United States v. Real Estate Savings Bank, 104 U. S. 728; 36 L. Ed. 908; United States v. Louisville, 169 U. S. 249; 18 S. Ct. 358; 42 L. Ed. 735; Penrose v. Skinner (D. C.), 278 F. 284; United States v. Trainer National Spring Co. (no opinion filed), but recently decided by Judge Baltzell in the United States District Court for the District for Indiana.

"As was pointed out by the Court in United States v. Real Estate Savings Bank, supra, 'the fact of fraud or mistake must be established by competent evidence, the same as any other fact in issue. An allowance by the Commissioner in this class of cases is not the simple passing of an ordinary claim by an ordinary accounting officer, but a statement of accounts by one having authority for that purpose under an act of Congress.' No evidence has been offered in this case tending to show that the action of the Commissioner of Internal Revenue in ordering the refund to the defendant here in question was procured by means of any fraud or mistake, and such action is therefore now binding and conclusive upon the government, and not subject to review by this court."

No Fraud, Mistake or Error in Calculation.

It is to be noted that nowhere in the record is there any assertion that fraud or mutual mistake led to the allowance of the claim for refund or the issuance of the certificate upon which the suit was brought. The Commissioner of Internal Revenue has not revoked or cancelled nor attempted to revoke or cancel the certificate or in any manner to change his determination. On the contrary, he apparently stands firmly upon the propriety of his action.

Distinction Between Allowed and Rejected Claims.

The Court of Claims has disregarded the foregoing enunciations of principle and has assumed the authority to review the action of the Commissioner of Internal Revenue as in a certiorari proceeding or upon a direct appeal from the Commissioner's determination. In assuming this authority, the Court lost sight of fundamentals. The Commissioner of Internal Revenue represents the United States. He is vested with exclusive authority to determine the liability of taxpayers and to refund and pay back all sums erroneously or illegally collected. *So far as the United States is concerned, there is no proceeding provided for the review of his determinations.* Upon the United States, therefore, such determination is binding and conclusive and under no circumstances can the propriety of his action be inquired into in the Court of Claims. True it is that in the proper forum and upon proper pleadings, his allowance of a claim might have been impeached for fraud, deceit or mutual mistake, but that does not involve his jurisdiction or his power to determine every question which is within the scope of his authority and to bind the United States thereby. By his determinations the United States is not aggrieved. They have vested in him

the sole and exclusive authority to make them and, manifestly, he cannot appeal from his own determinations.

On the other hand, a taxpayer aggrieved by such determination has been accorded the right of review.

We emphasized below the distinction between the cases of a rejected claim for refund and an allowed claim therefor. The court noted the emphasis but confessed that it was unable to see the distinction.

To us it appeared obvious, and it appeared equally so to the court in *Peerless Paper Box Manufacturing Co.* v. *Routzahn*, 22 Fed. (2d) 459, where a similar question arose and where the court said:

> "Further, the government claims that no proper refund was filed as a condition precedent to filing this suit, and that the suit is barred by the Statute of Limitation. These contentions made by the government so far as the law relied upon goes, are not to be seriously disputed; but the facts stipulated here, it seems to me, do not bring the case within the principles contended for by the government. *This taxpayer is not seeking to maintain a suit to obtain a judgment for a rejected claim for refund, but to obtain a sum of money already determined and awarded by the Commissioner of Internal Revenue to belong to it as an over-payment of tax for 1918 and wrongfully applied by the defendant as a credit against the barred tax liability for the year 1917.*" (Italics ours.)

If this were an action brought to recover upon a claim which had been disallowed by the Commissioner of Internal Revenue, every question affecting the right of the petitioner to recover would be open to the United States; but this is not such an action. On the contrary, it is one to recover upon an account stated based upon the certificate of the United States that the taxes have been erroneously collected. The action was necessary and was brought not because of any infirmity in the plaintiff's claim, but

because of the assertion by the United States of the right to deduct from the amount concededly due to plaintiff, a sum which it is admitted it had no right to deduct. That improper attempt to collect indirectly a tax barred by the statute, was responsible for this controversy. It was the only issue involved and, in our view, the only one that could possibly be open for consideration. When the government abandoned it before the trial, there was no other issue for the court to pass upon.

No Review of Commissioner's Action.

It is to be noted that there is no procedure known to the law by which the determinations of the Commissioner of Internal Revenue may be reviewed. They cease to be material in any action seeking to test the liability for taxes or the right to recover overpayments. We have pointed out that no action or proceeding can be instituted by the United States. If an action be instituted by a taxpayer, it proceeds de novo. What the Commissioner may have done becomes unimportant. So it is also in proceedings before the United States Board of Tax Appeals. We are unable to see, therefore, upon what theory the court assumed to pass upon the propriety of the Commissioner's action.

As said in substance by this Court in *United States* v. *Kaufman,* supra, the petitioner was satisfied with his action. In fact, he based his claim upon it. The United States had not and could not have appealed from it. The Court of Claims, since it has no judicial authority to review the determination of the Commissioner has, by force of its decision, established itself as a branch of the executive department empowered to supervise and review the action of the Commissioner, and for this there is no authority. *As a matter of fact, the decision is completely*

destructive of the statutory authority vested in the Commissioner of Internal Revenue.

A long line of decisions in the Court of Claims itself voices disapproval of its procedure in the instant case.

In *Woolner* v. *The United States*, supra, it was urged by the United States in the Court of Claims that the Commissioner did not have sufficient evidence upon which to found his decision.

The Court said:

> "But that is beyond our jurisdiction to determine. When the law intrusts the decision of any question of fact to a designated public officer, the sufficiency of the evidence depends upon his own judgment and cannot be reviewed by any other officer or any tribunal. What would be sufficient for him, might not be sufficient for other minds and what would be sufficient for others, might be quite insufficient for him. It is enough for us to know that the Commissioner acted upon some evidence which was satisfactory to himself. *It is also urged that the certificate accompanying the application did not conform to that prescribed by the regulations. That is wholly immaterial, because it does not appear that it was the whole evidence acted upon, and the collector's certificate was a substantial compliance with the regulation under the circumstances and in connection with the records which it may be presumed the Commissioner had access to, and especially because it was received, accepted and acted upon by him, and cannot now be excepted to in this court for the first time.*" (Italics ours.)

The force of the words above quoted cannot be better illustrated than by the case at bar. The Commissioner of Internal Revenue, the sole officer to whom the duty of passing upon claims for refund is entrusted by the United States, has determined that a proper claim for refund of taxes admittedly overpaid has been presented to him and he has allowed it. It has been approved by the account-

ing department, and yet, in an action brought upon the allowance the Court below, without all the evidence before it, has determined that the Commissioner erred in his determination and in the issuance of the certificate. The Court of Claims has thus indulged in a process of review as upon a certiori to the Commissioner without, however, the institution or pendency of any such proceeding and without having had certified to it the entire record of the proceedings before him.

In *Bank of Greencastle's Case* (supra), passing upon a similar question, the court referred to Section 3220 and 3228 saying:

> "By these provisions Congress has conferred upon the Commissioner of Internal Revenue the power and duty of passing upon the merits and determining the validity of all claims for refund of taxes therein specified. His decisions thereon are in the nature of awards made by arbitrators. * * * We have heretofore had occasion to consider some of those cases, * * * But when the officer who is clothed with that power has allowed the claim and made his certificate to that effect, a new cause of action arises by implied contract or statute upon that certificate, into which the original demand is merged and may be prosecuted to judgment in this court, if for want of an appropriation or other cause its payment is refused at the Treasury. These views have been sustained by the Supreme Court. Kaufman's Case, 96 U. S. 567. * * *
>
> "After a claimant has applied to the Commissioner for the refund of a tax alleged to have been illegally assessed and wrongfully paid, it is for him to lay before that officer all the evidence upon which he relies to prove the facts; and it then becomes the duty of the Commissioner to weigh the evidence, to exercise his best and impartial judgment upon it, and to decide whether or not the claim shall be allowed. From the Commissioner's decision there is no appeal to any other executive office, on the one side or the other. * * * If the decision is in his (taxpayer's) favor and the Commissioner makes and certifies to an allowance, the liability of the United States becomes

fixed and the claimant's right to payment established. * * *

"The statute above cited authorizes the Commissioner himself to refund and pay back all taxes illegally assessed or collected; and were it not for the fact that the money received from internal revenue taxation is covered into the Treasury, instead of being passed to the credit of the Commissioner, he might pay the allowances made by him directly and without certifying them to the accounting officers. The latter course is made necessary by the requirements of the Constitution and laws relating to the drawing of money from the public Treasury. * * *

"There is no doubt that an allowance by the Commissioner may be impeached anywhere for fraud, for that avoids all contracts into which it enters as against the party defrauded; or for want of jurisdiction; or for a mistake apparent upon the certificate of allowance; or generally for such other irregularities in the proceedings as would avoid an award made by arbitrators so far as the proceedings are similar; but not for what might seem to others to be a mere mistake of judgment in the weighing and giving force and effect to evidence."

"*In the present case the only attempt on the part of the defendants to impeach the Commissioner's allowance is an effort to show that the original claim was not presented to him within two years after it accrued, as required by the statute and by the regulations prescribed by the Secretary of the Treasury. That was one of the facts in the case which the Commissioner was to determine.*" (Italics ours.)

The court, after adverting to various steps in the proceeding, said further:

"The Commissioner allowed the claim, coming to the conclusion that it was presented within the time required, and we are not prepared to say that we should come to a different determination if it were within our jurisdiction to review his action on that evidence. *We hold, however, that the Commissioner's decision on that point upon evidence before him,*

in the absence of fraud or irregularity, was conclusive and cannot be set aside in this court. Woolner's Case, 13 C. Cls., R. 355." (Italics ours.)

Dugan v. *The United States,* 34 C. Cls. 458, and the very recent case of *Swift* v. *U. S.,* 68 Ct. Cls. R. 97, are to the same effect.

The Court below has pointed to no authority to support the views it has expounded in the instant case. We find nothing to justify the revolutionary attitude adopted unless it be contained within its suggestion that no injustice is being done in view of the fact that there was an unpaid assessment against the taxpayer for 1917, barred by the Statute of Limitations. That it was influenced thereby it expressly denies. Whenever by indirection an illegal result is achieved, an injustice has been done. The collection of the tax for 1917 was barred (*Bowers* v. *New York & Albany Lighterage Company,* 273 U. S. 346; Revenue Act of 1926, Sec. 1106). Such barred tax cannot be offset against an overpayment; *Peerless Paper Box Co.* v. *Routzahn,* supra, (followed, *Brady* v. *U. S.,* 24 Fed. (2nd) 205). The U. S. was forced to and did abandon a contrary position. To permit its collection by the process adopted below is to pay a price out of all proportion to the result of the moment. The principles which have been disregarded are more important to the United States than the result that has been thrust upon it in the instant case.

Assuming that the action of the Commissioner of Internal Revenue in allowing plaintiff's claim for refund was open to review by the Court of Claims, the Court erred in holding, as a matter of law, that the allowance of the claim for refund was improper.

As we have said before, the court below has reversed the determination of the Commissioner of Internal Revenue as if an appeal from his ruling had been presented to it.

It has held that he improperly issued a certificate of over-assessment and granted the claim for refund, and it bases this holding upon the assertion that no proper claim for refund had ever been filed with the Commissioner. We think the court erred in so holding.

Limitation on Refund.

It appears from the record that in November of 1924, the Commissioner had determined that the petitioner had overpaid income tax in the amount for which it subsequently issued its certificate of over-payment (Special Finding 4, R. 13). The period of limitation then in effect precluded the refund of the overpayment, but the statute was subsequently amended (Act of March 3, 1925, c. 43, Stat. 1115) so as to permit such allowance.

Limitation Removed
Refund Allowed.

In accordance with that amending act, on May 16, 1925, the Commissioner wrote the taxpayer that the refund could not be allowed "unless an income and profits tax waiver was filed on or before June 15th, 1925." Thereupon, on May 22nd, 1925, the taxpayer filed the required waiver and on or about February 19th, 1927 at the request of the Commissioner filed a formal claim on Form 843. On or about March 8, 1927, the Commissioner duly approved and scheduled to the Collector of Internal Revenue a certificate of overassessment No. 990988 in petitioner's favor and on or about May 12, 1927, caused the original certificate to be delivered to the petitioner. A copy of that certificate was annexed to the petition in the court below as Exhibit "A" (R. 8, 9) and formed the basis of the plaintiff's suit.

The respondent put in evidence various records on file in the office of the Commissioner with a view to showing that he had acted improperly in issuing the certificate of

over-assessment and allowing the claim for refund. This evidence was made the subject of special findings which indicate that on or about February 5th, 1927, H. B. Robinson, Head of Consolidated Return Audit, Income Tax Unit, approved and recommended for allowance a proposed certificate of over-assessment No. 990988 showing over-assessment and overpayment of $10,866.43 under plaintiff's income tax return for the fiscal year ended January 31st, 1919. The record of the case was then checked in the claims control section of the clearing division to determine whether the plaintiff had filed a claim for refund prior to the expiration of the period of limitation applicable thereto. It was there determined, with the approval of Mr. W. T. Sherwood, then head of the clearing division, but now the Assistant Deputy Commissioner of the Income Tax Unit that the documents on file which included the Bureau's audit letter of November 19th, 1924, the Bureau's letter to plaintiff on May 16, 1925, requiring a waiver, the reply made by plaintiff's counsel dated May 22nd, 1925, enclosing and filing the suggested waiver, would be treated by the Bureau as an informal claim for refund filed May 23, 1925 (Finding 9, R. 16).

The letter dated May 22nd, 1925, returning the waiver properly executed by the plaintiff, which had been sent to it by the Commissioner was received and filed by the Bureau of Internal Revenue on May 23, 1925. The Bureau of Internal Revenue endorsed upon the letter returning the waiver, as follows:

> "Inferential demand for the refund upon basis of the schedule sent taxpayer under date of November 19, 1925. Rules and Regulations, Mulligan."

This endorsement was not dated. A further endorsement appears upon this letter as follows:

> "Approved by Mr. Mulligan and Mr. Sherwood for scheduling as is. O. Allen 4/4/27."

On February 5th, 1927, the Bureau executed a certificate of overassessment for $10,866.43 and the following certifications appear on the margin of the Bureau's record copy of overassessment:

> "Waiver filed May 23, 1925. Formal claim for refund filed May 23, 1925, with waiver perfected by claim Form 843. (Signed) O. Allen 3/4/27.
>
> Claim for refund filed May 23, 1925; waiver filed May 23, 1925.
>
> This C. of O. approved for scheduling as is by H. T. S. (Signed) O. Allen, 4/4/27" (Finding 10, R. 16-17).

It was found also that the Commissioner of Internal Revenue thereafter allowed the plaintiff's claim for refund in the amount of $10,866.43 on or about March 8, 1927; duly approved and scheduled to the Collector of Internal Revenue a certificate of overassessment No. 990988 in plaintiff's favor and on or about May 12th, 1927, caused the original certificate to be delivered to the plaintiff. It was contended that these certifications and records did not indicate the filing of a proper informal claim for refund and that, therefore, the filing of a formal claim thereafter could not perfect it despite the view of the Commissioner to the contrary (Finding 11, R. 17-18).

Incomplete Record of Proceedings before Court of Claims.

Before discussing the question of law we insist, as we did below, that there is nothing to indicate that the papers offered were a complete record of the proceedings before the Commissioner. The Court of Claims has said that if there was anything favorable in the record before the Commissioner, it was incumbent upon the petitioner to produce it, and that the court would have the right to conclude that there was nothing of that character, in the

absence of its production by the petitioner. We challenge this as an improper statement of the law governing such matters. It overlooks the presumption of propriety and regularity attaching to the certificate of the Commissioner of Internal Revenue.

U. S. v. *Chemical Foundation, Inc.*, 272 U. S. 1.

Presumption from Certificate.

It overlooks the fact that that certificate is prima facie evidence upon which the petitioner has the right to rely and that anyone directing an attack against it, has the burden of showing, by clear and satisfactory evidence that it was improperly issued. This presumption of regularity extends to every step required by law to be taken as a condition to its issuance.

The overpayment of the tax had been determined as early as November, 1924, as the result of a claim for abatement and protest filed against an additional assessment. It is evident from the record that the petitioner was endeavoring to secure the refund of this overpayment. The bar of the limitation statute precluded the refund. The bar was removed by amendment early in 1925, and thereafter, the Commissioner immediately took the matter up and indicated his willingness to refund the tax upon the filing of a waiver as provided by the amendment. This waiver was filed. No suggestion was made that time that anything further was desired by the Commissioner. Subsequently, he requested the filing of a formal claim on the departmental form provided for that purpose. This was executed and immediately filed. Thereafter, he issued his certificate of overassessment. Assuming that the certificate was open to attack, it was incumbent upon the attacking party to show that there was nothing before the Commissioner upon which he could properly allow the claim. The respondent has fallen far short of maintaining that burden,

and there is no finding that there was not other evidence before the Commissioner.

If we assume, however, that the question was open for review and that the respondent has produced all the evidence that was before the Commissioner, we submit that the allowance of the claim for refund was entirely proper.

Informal Claims for Refund.

The statute does not define "a claim for refund" but leaves the matter to the regulations of the Commissioner and the secretary of the Treasury. There are formal claims for refund prepared strictly in accordance with the regulations and informal or defective claims which fail to meet one or more of the detailed requirements of the regulations. The existence and effect of the latter have been long recognized—certainly since 1884 when they were discussed in 14 Op. Attorney General 814. The whole subject was elaborately considered in Law Opinion 1116 published in Internal Revenue Cumulative Bulletin III-1, pages 350 to 359. Under the terms of the Treasury decision 4266 approved by the Secretary of the Treasury March 22, 1929, informal or defective claims were held to be sufficient to toll the Statute of Limitations if perfected by formal claims filed prior to May 1st, 1929. This treasury decision was a statement of a long standing practice of the Bureau of Internal Revenue.

Purpose is Notice.

The purpose of the statutory requirement for filing a claim for refund is to give the Commissioner of Internal Revenue notice of the existence of the claim and the grounds upon which the claim is made. In this case the Commissioner had full notice. He himself had already ascertained the overpayment and had invited the filing of a waiver so that a refund could be made under the

terms of the amended statute. The documents on file, therefore, constituted a valid claim for refund and full compliance with the statute, and were so treated by the Commissioner.

In *Tucker* v. *Alexander*, 275 U. S. 228, 231, this court in speaking of the statutory requirements and regulations affecting claims for refund, said:

> "The statute and the regulations must be read in the light of their purpose. They are devised, not as traps for the unwary, but for the convenience of government officials in passing upon claims for refund and in preparing for trial. Failure to observe them does not necessarily preclude recovery. If compliance is insisted upon, dismissal of the suit may be followed by a new claim for refund and another suit within the period of limitations. If the Commissioner is not deceived or misled by the failure to describe accurately the claim, as obviously he was not here, it may be more convenient for the government, and decidedly in the interest of an orderly administrative procedure, that the claim should be disposed of upon its merits on a first trial without imposing upon government and taxpayer the necessity of further legal proceedings. We can perceive no valid reason why the requirements of the regulations may not be waived for that purpose. We are not unmindful of those cases holding that in suits against the government no officer of the government may waive statutes of limitations. *Finn* v. *United States*, 123 U. S. 227. Such waivers, if allowed, would defeat the only purpose of the statute and impose a liability upon the United States which otherwise would not exist—consequences which do not attach to the waiver here."

The attack made in the instant case is not upon the merit of the claim. Concededly the overpayment was made and was refundable. It is charged that proper claims therefor were not filed and that, therefore, the Commissioner should have denied the claim. Counsel for the United States has endeavored to make it appear that the instant

case involves the right of the Commissioner to waive the Statute of Limitations. The record shows, however, persistent effort on the part of the petitioner to recover the refund. It was admittedly refundable but for the bar of the statute. When the bar was lifted, the Commissioner accepted the papers on file with him as a proper claim for refund. Whatever objection may have been made was to irregularities only, and this the Commissioner waived. We do not admit that there was irregularity, nor that it was at all necessary for the Commissioner to have required the subsequent filing of a formal claim. He might have made the allowance without it, but he chose to require it and it was furnished.

Informality Cured or Waived.

In *Zeller* v. *U. S.*, 35 Fed. 2(d) 870, the point decided was similar to that involved in this case, except that here the petitioner is seeking the enforcement of a claim already allowed, while there the Commissioner had rejected the claim. In the *Zeller* case, it was contended that the tax assessed was erroneous and that a proper claim for refund was filed, but it was contended that it was filed too late for acceptance. The court said that the propriety of the government's contention rested upon whether or not the Commissioner was sufficiently apprised of the grounds asserted to enforce the informal claim. The Commissioner had, without objection, repaid part of the excess payment. The court held, upon the merits, that the government had waived any claim of informality and quoted at length from *Tucker* v. *Alexander*, 275 U. S. 228. The court referred also to the decision in the Court of Claims in *Swift* v. *U. S.*, 68 C. Cls. R. 97, where it was stated that an insufficiency in the statement of claim for refund was merely one of form and could be cured by such amendment as the plaintiff subsequently filed, even though made after the expiration of the Statute of Limitations.

To the same effect is *Art Metal Construction Co.* v. *The United States*, 35 Fed. 2(d) 379, where it was said:

> "It clearly was the duty of the Commissioner to make refund of a tax when there was overpayment, and upon failure so to do, the taxpayer has a right of recovery, provided he has filed a proper claim for refund. * * * Assuming the insufficiency of the original claim for refund, it is nevertheless important to note that the Commission retained it without objection until the statute of limitations expired, and as the entire litigation concerning the tax of 1917 related to plaintiff's application for special assessment, and the letter amending the original claim specifically related thereto, I am of opinion that the Commissioner treated the insufficiency as a mere informality. * * * (Citing Tucker v. Alexander and other cases.)
>
> * * * Nor does the delay in filing the second waiver bar recovery, for amendment to a claim for refund may be submitted even though the Statute of Limitations has expired. Upon this point see Swift & Co. v. The United States, 67 Ct. Cls. 322, decided March 18, 1929. * * * We are not dealing with a waiver of the Statute of Limitations or loss of jurisdiction or statutory power by the Commissioner, but rather with a waiver of a departmental regulation promulgated for the convenience of taxing officials, and to enable them to properly discharge their duties and prevent litigation. * * *
>
> It is my opinion that the defect in the original claim was waived by the Commissioner, who treated it as a sufficient claim; that the Statute does not bar recovery; and that the action was brought within the period of limitation."

In the cases which we have referred to, there was a refusal by the Commissioner to grant the refund. He claimed non-compliance with statutory provisions or regulations. In the instant case, he has certified the compliance and the judicial department of the government has reversed him.

Decision Destructive of Powers of Commissioner.

It must be evident that recognition of the doctrine promulgated by the Court of Claims leads to an absolute destruction of the statutory power of the Commissioner to audit claims and to determine whether taxpayers are entitled to refunds. It results in passing on to the judicial branch of the government a right of review of the Commissioner's actions and, in the final analysis, establish the court as the original forum for the determination of such claims. The same thing would apply to every other department of the Government. The Court of Claims would thus become a court of visitation and supervision upon the executive branches of the government.

If the Court of Claims had the power to review the action of the Commissioner and if it properly found infirmity in the first cause of action, the petitioner was nevertheless entitled to judgment on its second cause of action which was upon an account stated.

We have referred to and quoted at length from the decisions of this Court, the Court of Claims and others such as U. S. v. Kaufman, U. S. v. Savings Bank, Bank of Greencastle's Case, all supra, for the purpose of showing that upon the issuance of the certificate of the Commissioner of Internal Revenue the liability of the United States to pay in accordance therewith becomes fixed and established; that the action then proceeds upon an implied promise or an account stated. The doctrine of these cases seems never to have been departed from until the decision in the instant case. In the recent case of *United Motors Corp.* v. *U. S.*, 44 Fed. 2(d) 407, where the defense was interposed that the claim for refund filed by the plaintiff was inadequate, the District Court said:

> "The Commissioner acted upon the claim as filed, sustained it in part and issued a certificate of over-

assessment as to the part allowed. The present action is based upon such certificate and not upon the original overpayment of tax. The plaintiff has chosen to treat the certificate as an implied promise to pay by the United States (U. S. v. Kaufman) or as an account stated (U. S. v. Savings Bank). Under such circumstances the sufficiency of the claim for refund is of no consequence. Nor is there any force in the point that the plaintiff should have filed another claim for refund based upon the certificate of overassessment."

In such an action, that is, upon an implied promise or account stated, inquiry into the action of the Commissioner is entirely improper. All such matters become immaterial after the issuance of the certificate. No defense cognizable at law was interposed, to the second cause of action. The only defense possible was that of fraud or mistake and it was not and could not have been pleaded or proved. No suggestion of fraud or mistake appears upon the record.

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Claims dismissing the petition should be reversed, and that judgment should be directed by this Court in favor of petitioner for the amount sued for, and interest.

Respectfully submitted,

ARTHUR B. HYMAN,
Counsel for Petitioner.

Appendix.

Special Findings of Fact.

1. The plaintiff, Bonwit Teller & Co., is a corporation engaged in the business of selling feminine wearing apparel at retail. During the years involved in this action, plaintiff has established its fiscal year as beginning February first and ending January thirty-first.

2. On May 17, 1918, the plaintiff filed its income and profits tax return for its fiscal year ended January 31, 1917, and seasonably paid the taxes therein reported. On February 14, 1923, the plaintiff and the Commissioner of Internal Revenue executed a written agreement which operated to extend the period of limitation for determination, assessment, and collection of 1917 income taxes until April 1, 1924. No other or further waiver was ever executed with respect to that taxable period.

On March 28, 1923, the Commissioner of Internal Revenue made an additional assessment of $11,057.57 against the plaintiff for the fiscal year ended January 31, 1917. A portion of that assessment was subsequently abated, leaving a balance of $9,846.06 outstanding on the records of the collector. The plaintiff has paid no part of that balance and no suit or proceeding for the collection thereof has been instituted against it.

3. The plaintiff on or about July 14, 1919, filed its corporation income and profits tax return for the fiscal period begun February 1, 1918, and ended January 31, 1919, reporting $57,871.16 as the tax due upon its reported taxable income. The tax was paid by the plaintiff to the Government of the United States through its collector of internal revenue for the third district of New York; $28,935.58 of the said tax was paid on July 14, 1919; the remaining $28,935.58 was paid on December 13, 1919.

Pending the audit and review of the plaintiff's income and profits tax return for the fiscal period ended January 31, 1919, the Commissioner of Internal Revenue determined the plaintiff's total tax liability for that period to be $225,165.75 instead of $57,871.16 as returned, and in April, 1924, made a jeopardy assessment against the plaintiff for the difference of $167,294.59. No part of that additional assessment was paid, and on or about May 22, 1924, the plaintiff (fol. 15) filed a claim for abatement of the full amount thereof. The claim was thereafter allowed in full, as will hereinafter be related.

4. While the aforesaid claim for abatement was under consideration, and prior to its formal allowance, the Acting Deputy Commissioner of Internal Revenue addressed a letter to plaintiff under date of November 19, 1924, relating to the income tax liability of the plaintiff and its Massachusetts subsidiary company for the years 1919, 1920, and 1921, containing a schedule showing the manner in which the Internal Revenue Bureau had computed the tax for the plaintiff's fiscal year ending January 31, 1919, and a total overassessment of $178,161.02, from which a deduction was made of $10,866.43, leaving the amount overassessed for said fiscal year at $167.294.59.

In connection therewith it was further stated in explanation of the deduction:

> "Inasmuch as the provisions of section 281 of the revenue act of 1924 have not been complied with regard to the full amount of the above overassessment, a portion in the amount of $10,866.43 can not be allowed."

The plaintiff was informed that a certificate of overassessment would be issued through the office of the collector of internal revenue for its district and would be applied by that official in accordance with the provisions of section 281 (a) of the revenue act of 1924.

The Commissioner of Internal Revenue subsequently allowed in full the plaintiff's claim for abatement of the additional 1919 assessment of $167,294.59 hereinbefore referred to, and duly issued and scheduled to the collector of internal revenue a certificate of overassessment, No. 715402, in the plaintiff's favor for the said sum.

5. On December 11, 1926, Arthur B. Hyman, of Paskus, Gordon & Hyman, counsel for the plaintiff, addressed the following letter to C. R. Nash, assistant to the Commissioner of Internal Revenue:

> "Under date of November 19th, 1924, you determined an apparent deficiency in tax against the above-named company for the years ended January 31st, 1918 to 1921, inclusive. Additional taxes were found to be due in the years 1918, 1920, and 1921. In the year 1919 you found an overpayment of tax in the sum of $10,866.43 (p. 5, Schedule 10). You certified that inasmuch as section 281 of the revenue act of 1924 had not been complied with, the amount which would otherwise have been refundable—that is, $10,866.43—could not be refunded.
>
> Subsequently, under date of May 16th, 1925, you wrote to the taxpayer as follows:
>
> > 'An examination of your income-tax return for the year ended January 31st, 1919, discloses an apparent over-assessment of tax for the year. It appears that the overassessment can not now be allowed, due to the limitation of time for allowance thereof, provided by section 281 of the revenue act of 1924, unless an income and profits tax waiver is filed on or before June 15th, 1925, as provided by an act of Congress dated March 3, 1925, amending section 281 E of the revenue act of 1924. Two waiver forms are therefore enclosed in order that you may, if you desire, execute and forward one of the forms to this office.'
>
> On May 22nd we wrote to you as follows (fol. 16):

'J. G. Bright, Esq., Deputy Commissioner of Internal Revenue, Washington, D. C.

DEAR SIR: In accordance with your request, we enclose you herewith waiver.'

Since that time we have heard nothing further from you and there has been no refund made to the taxpayer.

In this connection we desire particularly to emphasize the fact that you yourself discovered the overpayment of taxes for the year in question in connection with the audit of the taxpayer's return. It is your custom in such cases to make immediate refund, that is to say, if there are available appropriations for that purpose. In your letter no suggestion was made that anything further was necessary than the filing of the waiver, which was very promptly done.

A protest was filed by the taxpayer covering the year in question and a certificate of overassessment, No. 715402, Schedule No. 14872, was issued.

It goes without saying, of course, that your office desires that every taxpayer should be accorded that to which he is entitled, and we presume, therefore, that you will see that such a disposition is made of this case."

6. The waiver referred to in the finding next preceding was received by the Bureau of Internal Revenue on May 23, 1925, and accepted in writing by the commissioner.

7. On February 9, 1927, C. R. Nash, assistant to the Commissioner of Internal Revenue, addressed the following letter to counsel for the plaintiff:

"Further reference is made to your letter dated December 11, 1926, relative to the income-tax account of Bonwit Teller & Company, New York, New York, for the fiscal year ended January 31, 1919.

In this connection you are advised that, in order that the allowance of the overassessment may be made you are requested to file with this office a claim on the enclosed Form 843 setting forth the basis of the

adjustment, making reference in your reply to IT:C:CC:3:OTA."

On February 17, 1927, the following letter was sent to Mr. Nash:

"In accordance with your letter of February 9th, 1927, we enclose herewith for filing claim for refund in the sum of $10,866.43, of Bonwit Teller & Co., on Form 843."

8. The plaintiff's claim for refund of $10,866.43 made on Form 843 was received by and duly filed in the Bureau of Internal Revenue on or about February 19, 1927. The plaintiff alleged that it believed its application for refund should be allowed "for the reasons stated in letter of C. B. Allen, acting deputy commissioner, dated November 19, 1924, containing the symbols IT:CR:A:JML—addressed to the taxpayer, a copy of which is hereto annexed and made a part hereof."

9. On or about February 5, 1927, H. B. Robinson, head of the consolidated returns audit division of the Income Tax Unit, approved and recommended for allowance a proposed certificate of overassessment, No. 990988, showing overassessment and overpayment of $10,866.43 under the plaintiff's original income-tax return for the fiscal year ended January 31, 1919. The record of the case was then checked (fol. 17) in the claims control section of the clearing division, to determine whether the plaintiff had filed a claim for refund prior to the expiration of the period of limitation applicable thereto. It was there determined with the approval of Mr. W. T. Sherwood, then head of the clearing division and now Assistant Deputy Commissioner of the Income Tax Unit, that the documents on file, which included the bureau's audit letter of November 19, 1924, the bureau's letter to plaintiff of May 16, 1925, inviting a waiver and the reply made by plaintiff's counsel

dated May 22, 1925, enclosing and filing the suggested waiver, would be treated by the bureau as an informal claim for refund filed May 23, 1925.

10. The letter dated May 22, 1925, returning the waiver properly executed by the plaintiff, which had been sent to it by the commissioner, was received and filed by the Bureau of Internal Revenue on May 23, 1925. The Bureau of Internal Revenue indorsed upon the letter returning the waiver as follows: "Inferential demand for the refund upon basis of the schedule sent taxpayer under date of November 19, 1924 (IT:CR:A:JML). Rules and Regulations. Mulligan." This indorsement was not dated. A further indorsement appears upon this letter as follows: "Approved by Mr. Mulligan and Mr. Sherwood for scheduling as is. O. Allen. 4/4/27."

On February 5, 1927, the bureau executed another certificate of overassessment for $10,866.43 and the following certifications appear upon the margin of the bureau's record copy of overassessment:

> "Waiver filed May 23, 1925. Informal claim for refund filed May 23, 1925, with waiver perfected by claim Form 843. (Signed) O. Allen, 3/4/27.
>
> Claim for refund filed May 23, 1925, waiver filed May 23, 1925.
>
> This C. of O. approved for scheduling as is by W. T. S. (Signed) O. Allen, 4/4/27."

11. The Commissioner of Internal Revenue thereafter allowed the plaintiff's claim for refund in the amount of $10,866.43 and on or about March 8, 1927, duly approved and scheduled to the collector of internal revenue a certificate of overassessment, No. 990988, in the plaintiff's favor, and on or about May 12, 1927, caused the original certificate to be delivered to the plaintiff. A copy of the said certificate of overassessment is annexed to the petition of the plaintiff as its Exhibit A and is made a part hereof

by reference. The collector of internal revenue after receiving the certificate of overassessment, certified the same as an overpayment by the plaintiff for its fiscal year ended January 31, 1919. He thereafter credited $9,846.06 of the amount allowed on the schedule against the additional tax assessed for 1917, referred to in Finding 2 hereof, and a check for $1,462.99, which included the balance of the overassessment of $1,020.37 and interest thereon in the amount of $442.62, was subsequently issued in favor of the plaintiff. The plaintiff has never presented said check for payment but has held it in its possession and has offered to apply it upon the claim involved herein if the defendant so desired and agreed, and the plaintiff has protested against the application of any part of this refund upon its tax for the year 1917 on the ground that said tax was barred by the statute of limitations.